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No. 98-___

In The

Supreme Court of the United States

October Term, 1997

DAVID R. McKUNE, Warden,
CHARLES SIMMONS, Secretary of Corrections,

Petitioners,

v.

MARK L. STELTZLEN,

Respondent.

On Petition For A Writ Of Certiorari To The Kansas Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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HIPP

QUESTIONS PRESENTED

1. Is a state department of corrections regulation that implements a statutory directive that all good time credits "shall be awarded on an earned basis" a "law" for *ex post facto* purposes?

2. Does a state department of corrections regulation that changes the awarding of good time credits from "a projected basis" to "an earned basis", as required by the controlling statute and solely for purposes of determining an inmate's conditional release date, without any negative impact on credits accumulated prior to the regulation's effective date nor the total amount of credits available, violate constitutional *ex post facto* principles?

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OPINIONS BELOW

The September 5, 1997, decision of the Kansas Court of Appeals, holding that an administrative regulation changing good-time credits from presumptively earned to actually earned for purposes of calculating conditional release dates violates constitutional *ex post facto* principles is unpublished, see 944 P.2d 197 (1997) (table of cases), but is included as Appendix A. The unreported July 9, 1998 order of the Kansas Supreme Court denying the petitioners' request for review of the Court of Appeals decision is included as Appendix B.

JURISDICTION

This Court's jurisdiction to review the final judgment of the Kansas Court of Appeals is invoked pursuant to 28 U.S.C. § 1257(a). The Kansas Court of Appeals issued its decision in this case on September 5, 1997, the Kansas Supreme Court denied review of that decision on July 9, 1998, and this petition has been filed within ninety days of the latter date as required by Supreme Court Rule 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The *Ex Post Facto* Clause applicable to the States provides that

> "No State shall . . . pass any . . . ex post facto Law. . . . U.S. Const. Art. I, § 10.

Kansas Statute Annotated (K.S.A.) § 22-3718 provides in part that an inmate's conditional release date is

> the inmate's maximum term or terms, less such work and good behavior credits as have been earned. . . .

K.S.A. § 22-3725(d) provides that

> Good time credits shall be awarded on an earned basis pursuant to rules and regulations adopted by the secretary of corrections.

The Kansas Administrative Regulation ("K.A.R.") invalidated in this case, K.A.R. 44-6-142, provides as follows:

> When computing the conditional release date, it shall be presumed that prior to March 1, 1995, 100% of the available good time credits were earned. On and after March 1, 1995, good time credits shall be awarded *on an earned basis* pursuant to K.A.R. 44-6-124 for the purpose of determining the conditional release date. K.A.R. 44-6-142 (1995) (emphasis added).

The prior version of the regulation, effective when respondent was convicted and sentenced, provided that

> When computing the conditional release date, it shall be presumed that 100% of the available good time credits has been earned, and the good time credits shall be applied *on a projected basis*. K.A.R. 44-6-142 (1991) (emphasis added).

STATEMENT

Procedural History

Respondent, Mark L. Steltzlen, incarcerated in 1990 under a 15- to 20-year sentence for aggravated robbery, filed this state post-conviction action in Kansas district court, alleging that an amendment to the Kansas Department of Corrections regulation regarding the awarding of good time credits for purposes of determining an inmate's conditional release date violates constitutional *ex post facto*-principles. The trial court agreed with respondent's contention and ruled in his favor. On September 5, 1997, the Kansas Court of Appeals affirmed. Appendix A.

On July 9, 1998, the Kansas Supreme Court denied review of the Kansas Court of Appeals' decision in this case, Appendix B, after contemporaneously deciding two other inmate cases raising similar or identical *ex post facto* challenges in favor of the inmates and denying petitioners' requests for rehearing of those decisions. *See Bankes v. Simmons, et al.*, No. 98-___, and *Stansbury v. Hannigan, et al.*, No. 98-___ (petition for writs of *certiorari* filed simultaneously with this petition for a writ of *certiorari*). The Kansas Supreme Court denied petitioners' request for recall of the mandates in this case and the decisions mentioned above pending proceedings in this Court. Appendix C. Petitioners are filing simultaneously with this petition an application for a stay of the Kansas courts' decisions in these cases with Justice Breyer, Circuit Justice for the Tenth Circuit.

Statement Of Facts

1. *The Kansas Statutes And Administrative Regulations Concerning Good Time Credits And Conditional Release Dates*

In Kansas, the awarding of good time credits is authorized by statute. *See* K.S.A. § 22-3725. Some details of how such credits are earned, awarded, forfeited, withheld and accumulated are included in the statute, but the statute also provides that "[g]ood time credits shall be awarded on an earned basis pursuant to rules and regulations adopted by the secretary of corrections." *Id.* at § (d).

The earning, awarding, forfeiting, withholding and accumulation of good time credits affect two important dates for inmates: (1) an inmate's parole eligibility date; and (2) an inmate's conditional release date. The parole eligibility date is, as its name suggests, the date on which an inmate first becomes eligible to be considered for parole. In Kansas, that date is the "entire minimum sentence imposed by the court, less good time credits." K.S.A. § 22-3717(a). The conditional release date, on the other hand, is the date on which an inmate is entitled to be released from incarceration. Conditional release is "the inmate's maximum term or terms, less such work and good behavior credits as have been earned." K.S.A. § 22-3718; *see generally Beck v. Kansas Adult Authority*, 241 Kan. 13, 29-30, 735 P.2d 222, 234-35 (1987).

These important dates, when the inmate is serving an indeterminate sentence less than life imprisonment, are calculated by deducting good time credits from the minimum and maximum terms of imprisonment respectively.

Thus, the parole eligibility date for an inmate like Steltzlen serving a 15- to 20-year sentence is calculated by deducting good time credits from 15 years, while the conditional release date is calculated by deducting good time credits from 20 years.

With respect to conditional release dates, the Department of Corrections regulation in effect at the time the respondent in this case committed his crime, was convicted and sentenced provided that "it shall be presumed that 100% of the available good time credits has been earned, and the good time credits shall be applied on a projected basis." K.A.R. 44-6-142 (1989); *see also* K.A.R. 44-6-108(c) (1989). This meant that, solely for purposes of calculating the conditional release date, the instant an inmate entered prison the inmate was presumed to have earned 100% of the available good time credits. So, in the preceding example, if the available good time credit on a 20-year sentence was 10 years, the inmate's conditional release date would be 10 years from the date of incarceration, and that date would be established the day the inmate entered the prison. In 1995, however, the Department of Corrections amended the regulation to provide that

> When computing the conditional release date, it shall be presumed that prior to March 1, 1995, 100% of the available good time credits were earned. On and after March 1, 1995, good time credits shall be awarded *on an earned basis* pursuant to K.A.R. 44-6-124 for the purpose of determining the conditional release date. K.A.R. 44-6-142 (1995) (emphasis added).

What is undisputed and unchanged about good time credits in Kansas is that the relevant statutes have not changed and the total amount of good time credits available to shorten conditional release dates is unchanged. Only if the respondent engages in misconduct after the effective dates of the regulatory changes discussed above, as he has, will his conditional release date be any different than it would have been under the regulatory scheme in effect when he committed his crimes, was convicted and sentenced. Unlike the petition for writs of *certiorari* in *Bankes v. Simmons, et al.*, No. 98-___, and *Stansbury v. Hannigan, et al.*, No. 98-___ (filed simultaneously with this petition), which also involve issues regarding parole eligibility dates, this case involves an *ex post facto* challenge only to the regulation governing the calculation of conditional release dates.

2. *Mark L. Steltzlen and These Proceedings*

Mark Steltzlen was convicted of aggravated robbery and sentenced to a term of 15 to 20 years imprisonment in 1990. App. 2a. As noted previously, administrative regulations in place in the Kansas prisons in 1990 presumed that, for purposes of determining conditional release dates, all available good time credits were earned on a projected basis. Thus, Steltzlen's conditional release date was May 17, 2000, 10 years from the day his sentence began.

After the 1995 amendment to the regulation, which required that all good time credits toward conditional release be earned after March 1, 1995, prison officials credited Steltzlen only for all possible good time up to

March 1, 1995, altering his conditional release date to August 3, 2005. If Steltzlen earned all available good time credits after March 1, 1995, ultimately his conditional release date still would be May 17, 2000. He has not done so, however, and thus his conditional release date remains later than May 17, 2000, although not as late as August 3, 2005. At the time the Court of Appeals decided this case, Steltzlen's conditional release date was October 17, 2004.

3. *The Kansas Court of Appeals' Decision*

The Kansas Court of Appeals began its *ex post facto* analysis by citing and quoting this Court's decision in *Weaver v. Graham*, 450 U.S. 24 (1981), for the proposition that " 'two critical elements must be present for a criminal or penal law to be *ex post facto*: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it.' " App. 14a (quoting *Weaver*, 450 U.S. at 29). The court first considered whether the constitutional *ex post facto* prohibition applies to prison regulations, as opposed to legislative enactments, but concluded that, at least in Kansas, it does. The court reached this conclusion by relying upon the proposition that "[p]olitical subdivisions of a state, or quasi-legislative instrumentalities, exercising delegated legislative power are within the ambit of the ex post facto clause." App. 15a (quoting 16A C.J.S., *Constitutional Law* § 409, p. 355). The court deemed this proposition "an appropriate approach in Kansas"

where properly promulgated regulations are deemed to have the force and effect of law. App. 15a.[1]

The court then turned to the issue whether the change in calculating conditional release dates is retrospective. Citing *Weaver*, which involved an *ex post facto* challenge to a statutory reduction in the number of good time credits awarded automatically to Florida inmates, the court of appeals opined that "[i]t is the effect of the law that determines whether it is *ex post facto*. App. 15a. The court observed that *Weaver* declares that an *ex post facto* finding does not depend on the existence of vested rights (which good time credits are not) and that the retrospectivity issue is decided by asking whether the statute in question applies to prisoners convicted for acts committed before the statute's effective date. App. 16a. If it does, as the regulation does with respect to Steltzlen, then the change is retrospective.

The court then addressed the second requirement of *Weaver* – whether the change in the law disadvantaged Steltzlen. The court pointed out that this Court in *Weaver* rejected the argument that the reduction in the amount of automatic good time credits Florida inmates received for good conduct was offset – for *ex post facto* purposes – by

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[1] There is an acknowledged split of authority in the Courts of Appeal and state courts on the question whether prison regulations are "laws" for *ex post facto* purposes. *See Bailey v. Noot*, 503 U.S. 952 (1992) (White, J., dissenting from the denial of *certiorari*); *Dominique v. Weld*, 73 F.3d 1156, 1162 & n. 10 (1st Cir. 1996) (noting the continuing split of authority); *see also Miller v. Florida*, 482 U.S. 423, 434 (1987) (observing that numerous lower federal courts have refused to apply the *Ex Post Facto* Clause to revisions in the *federal* parole guidelines).

new opportunities to earn equal or even greater good time at prison officials' discretion. App 16a-17a. Instead, this Court reasoned that Florida inmates were disadvantaged by the change because, even if they obeyed all prison regulations and completed all work assignments, the automatic credits they received would be reduced and they could only make up the difference by satisfying extra conditions that previously had not existed. 450 U.S. at 35.

The Kansas Court of Appeals decided that the same was essentially true in this case. Under the original regulation, Steltzlen was presumed to have earned all good time credits available against his 20-year maximum sentence (on the day he entered prison) and could lose them only by forfeiture as a punishment for disciplinary infractions. Under the new regulation, Steltzlen is required to actually earn all good time credits after March 1, 1995. In the court's view,

> [t]his is similar to the situation in *Weaver* where the statutory changes enacted there required the inmates to do something extra and to subject themselves to the discretion of the prison in order to gain the same level of early release advantage accorded under the old statute. App. 18a.

The court of appeals also opined that the new regulations "reach back and take away what was already given to Steltzlen . . . and, accordingly, have a disadvantageous retrospective effect on him." App. 18a (citing *Lynce v. Mathis*, 519 U.S. ___, 117 S. Ct. 891 (1997) (invalidating on *ex post facto* grounds the retroactive cancellation of good

time credits awarded to alleviate prison overcrowding that already had been used to obtain release).

Lastly, the court rejected the argument that the new regulations simply effectuate the statutory directives that good time credits toward conditional release shall be "earned." *See* K.S.A. §§ 22-3718, 22-3725. The court instead read this Court's decision in *Lynce v. Mathis* to direct that courts ignore purpose or intent in *ex post facto* cases and focus solely on the effect of the disputed changes. App. 19a. Thus, although the court admitted that the new regulation is entirely faithful to the statutory directives regarding conditional release, it concluded that the new regulation violates *ex post facto* principles because "it will put inmates like Steltzlen at a disadvantage." App. 19a.

REASONS FOR GRANTING THE WRIT

The two questions presented in this case are identical to Questions 1 and 2 in the petition filed simultaneously with this case in *Hannigan, et al. v. Stansbury*, No. 98-___, and *Simmons, et al. v. Bankes*, No. 98-___. For that reason, petitioner respectfully refers the Court to the full discussion of the reasons for granting *certiorari* review in that petition and incorporates that discussion by reference in this petition.

I. The Kansas Court Of Appeals' Decision Is Contrary To Decisions Of Federal Courts Of Appeal And State Courts Of Last Resort

A. The Lower State And Federal Courts Have Divided Over What Regulations Affecting Inmates Are "Laws" For *Ex Post Facto* Purposes And What Changes Affecting Good Time Credits Violate Constitutional *Ex Post Facto* Principles

Petitioners respectfully incorporate by reference the discussion under this same heading in the petition in *Hannigan, et al. v. Stansbury*, No. 98-___, and *Simmons, et al. v. Bankes*, No. 98-___.

B. The Court Of Appeals' Decision Addresses Important, Unresolved *Ex Post Facto* Questions On Which Prison Authorities And The Lower Federal And State Courts Require Guidance

Petitioners respectfully incorporate by reference the discussion under this same heading in the petition in *Hannigan, et al. v. Stansbury*, No. 98-___, and *Simmons, et al. v. Bankes*, No. 98-___.

II. The Kansas Court Of Appeals' Decision Is Contrary To This Court's *Ex Post Facto* Decisions

Petitioners respectfully incorporate by reference the discussion under this same heading in the petition in *Hannigan, et al. v. Stansbury*, No. 98-___, and *Simmons, et al. v. Bankes*, No. 98-___. In addition, this petition will

discuss the Kansas Court of Appeals' misreading of this Court's *ex post facto* cases.

1. First, and most importantly, the Kansas Court of Appeals erred in concluding that prison regulations are subject to *ex post facto* restrictions, at least in this case. Although the Kansas Department of Corrections promulgated the regulations pursuant to statutory authority, the controlling Kansas statute is clear that good time credits shall be "earned." The Department of Corrections lacked the power to provide otherwise, which simply proves the point that the *Ex Post Facto* Clause should be limited, as this Court's cases repeatedly have recognized, to the application of *penal statutes*. The conditional release statute in Kansas has not changed since respondent committed his crime, nor has his sentence changed, and he makes no such complaints. Moreover, not even the total amount of good time credits available to respondent has changed. Rather, respondent is complaining about an amendment to an administrative regulation designed to implement a statutory directive. The original regulation adopted an approach contrary to the plain statutory language and to the unwarranted benefit of inmates such as respondent. But there has been no change in the Kansas penal statutes that "alters the definition of criminal conduct or increases the penalty by which a crime is punishable." *California Dept. of Corrections v. Morales*, 514 U.S. 499, 506 n. 3 (1995).

2. Second, the Kansas Court of Appeals' opinion relies almost exclusively on this Court's decision in *Weaver v. Graham*, 450 U.S. 24 (1981), without even citing later decisions such as *Collins v. Youngblood*, 497 U.S. 37 (1990), and *California Dept. of Corrections v. Morales*, 514

U.S. 499 (1995). Thus, even assuming that prison regulations implicate the *Ex Post Facto* Clause, the Kansas Court of Appeals' decision hinges upon the sole proposition that "[i]t is the *effect* of the law that determines whether it is *ex post facto*." App. 15a (citing *Weaver*) (emphasis added). As explained more fully in the related petition in *Hannigan, et al. v. Stansbury*, No. 98-___, and *Simmons, et al. v. Bankes*, No. 98-___, that proposition is not consistent with most of the Court's recent *ex post facto* and "punishment" cases. *See, e.g., Hudson v. United States*, 522 U.S. ___, 118 S. Ct. 488, 493-95 (1997) (first question is whether enactment is non-punitive on its face or has non-punitive purpose); *Kansas v. Hendricks*, 521 U.S. ___, 117 S. Ct. 2072 (1997) (same); *cf. Lynce v. Mathis*, 519 U.S. ___, 117 S. Ct. 891, 897 (1997) (discussing to what extent legislative purpose may be relevant to the *ex post facto* analysis). Nor does the Court of Appeals' approach provide any limit to the reach of the *Ex Post Facto* Clause in the prison context, since many changes in prison regulations arguably have a disadvantageous "effect" on inmates.

In this case, the purpose behind the regulatory change is not punitive. The conditional release date regulation was amended to conform to the controlling statutory directive that good time credits be earned. The purpose of the amendment was not to impose additional criminal punishment on inmates.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that this Court grant this petition for a writ of *certiorari* in order to resolve the splits of authority in the lower federal and state courts, and set this case for plenary review.

Respectfully submitted,

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August, 1998

APPENDIX A

Kansas Court of Appeals Decision 1a

APPENDIX B

The Kansas Supreme Court Order Denying Review 20a

APPENDIX C

Kansas Supreme Court Order Denying Recall of Mandate 21a

APPENDIX A

NOT DESIGNATED FOR PUBLICATION

No. 77,897

IN THE COURT OF APPEALS OF
THE STATE OF KANSAS

MARK L. STELTZLEN,
Appellant/Cross-Appellee,

v.

DAVID R. MCKUNE, Warden, and
CHARLES SIMMONS, Secretary of Corrections,
Appellees/Cross-Appellants.

MEMORANDUM OPINION

Appeal from Leavenworth District Court; MARTIN ASHER, judge. Opinion filed September 5, 1997. Affirmed.

Charles J. Cavenee, of Legal Service for Prisoners, Inc., of Lansing, for appellant/cross-appellee.

Ed Britton, Jr., and *Jeff Cowger,* special assistants attorney general, and *Carla J. Stovall,* attorney general, for appellees/cross-appellants.

Before GREEN, P.J., PIERRON, J., and PHILIP C. VIEUX, District Judge, assigned.

Per Curiam: Mark L. Steltzlen appeals from a part of the trial court's judgment denying relief under his habeas corpus action. Steltzlen challenged the interpretation of certain amended regulations about how good time credits would be assigned to his conditional release date by the Department of Corrections (DOC). Although the trial

court found nothing wrong with DOC's interpretation of the amended regulations, the trial court determined that the amended regulations would violate the prohibition against ex post facto laws if the regulations were applied in determining Steltzlen's conditional release date. Steltzlen appealed and DOC cross-appealed.

Under K.S.A. 1996 Supp. 22-3725, Steltzlen was allowed to earn good time credits for up to half of his 1990 sentence of 15 to 20 years for aggravated robbery. Steltzlen's good time credits were subtracted from his minimum sentence to set a parole eligibility date and subtracted from his maximum sentence to establish a conditional release date. As a result, it was determined that Steltzlen's earliest possible parole eligibility date was November 17, 1997, and May 17, 2000, was his earliest conditional release date.

Before his parole eligibility date, Steltzlen forfeited 90 days of good time because of a disciplinary violation. In addition to the forfeiture, Steltzlen's unit team, which is charged with the duty of determining how many good time credits to award for each review period, concluded that Steltzlen should be awarded only 60 out of 120 possible good time credits. This resulted in a net loss of 30 days of good time credit. The forfeitures and withholdings were applied to both Steltzlen's parole eligibility date and to his conditional release date. Consequently, this action lengthened Steltzlen's confinement period before he would become eligible for parole and before he would reach his conditional release date.

In objecting to the adjustment of his conditional release date, Steltzlen claimed that K.A.R. 44-6-120 prohibited any adjustment of his conditional release date by forfeitures or withholdings until he reached his parole eligibility date. Although the warden agreed that good time credits could not be forfeited from Steltzlen's conditional release date before his parole eligibility date, the warden disagreed with Steltzlen on the issue of whether withheld good time credits could vary his conditional release. When the Secretary of Corrections (Secretary) affirmed the decision of the warden, Steltzlen petitioned for a writ of habeas corpus.

In his petition, Steltzlen argued that the forfeiture and the withholding of good time credits by the warden and the Secretary (1) were prohibited by other regulations of DOC and (2) violated the prohibition against ex post facto laws.

The first issue is whether the current regulations applicable to the award of good time credits and the setting of a conditional release date permit an inmate's conditional release date to be adjusted before the inmate reaches parole eligibility. The parole eligibility date represents the date on which an inmate becomes eligible to be considered for parole. Whether he or she is released at that time or at some later time prior to reaching the inmate's conditional release date is within the discretion of the Kansas Parole Board pursuant to statute and regulations. K.S.A. 22-3717; *Beck v. Kansas Adult Authority*, 241 Kan. 13, 29, 735 P.2d 222 (1987). In contrast, upon reaching his or her conditional release date, an inmate is entitled to be released. K.S.A. 22-3718; *Beck*, 241 Kan. at 29.

Steltzlen asserts that neither withholdings; nor forfeitures of good time credits are permitted to affect an inmate's conditional release date prior to the inmate reaching parole eligibility and, further, that only forfeitures may occur after parole eligibility. While DOC agrees that forfeitures of good time credits may not affect an inmate's conditional release date until after the inmate has reached his or her parole eligibility date, it asserts that good time withholdings are appropriately applied to the inmate's conditional release date both before and after reaching parole eligibility.

Resolution of this issue requires the interpretation of several regulations. Reviewing courts grant considerable deference to an agency's interpretation of its own regulations, and, unless clearly erroneous or inconsistent with the terms of the regulations, the agency's interpretation will not be disturbed. *Murphy v. Nelson*, 260 Kan. 589, Syl. ¶ 1, 921 P.2d 1225 (1996). In order to understand the parties' respective positions on both the interpretation issue and on the ex post facto issue, it is necessary to review the changes which have taken place in the applicable regulations since the time of Steltzlen's initial incarceration.

Regulations in Effect When Steltzlen Committed His Crime

Under the regulations in effect in 1990, when Steltzlen committed his crime and was incarcerated, parole eligibility was determined differently from conditional release. K.A.R. 44-6-108 (1989) stated in pertinent part:

> "(b) To establish eligibility for parole in certain cases amenable to reduction by good time credits, good time credits, as earned, shall

be awarded to reduce the time required to be served on the minimum term of those sentences as described in these regulations and applicable law.

"(c) To establish the conditional release date, good time credits, not forfeited, shall be presumed earned and shall be applied to the maximum sentence term when first computed."

K.A.R. 44-6-113 (1989) provided:

"In determining parole eligibility for cases . . . on and after January 1, 1979, including those after July 1, 1982, good time credits shall not be awarded in advance of earning or on a projected basis. Good time credits shall be awarded only after the inmate has been deemed, by the unit team, to have earned them. However, an auxiliary accounting record, separate from the official inmate record and for informational purposes only, may be used to show the maximum total authorized credits that the inmate may earn. This record may show the parole eligibility date which would occur if all good time were earned."

In contrast to 44-6-113 quoted above, K.A.R. 44-6-142(a) (1989) provided in pertinent part: "It shall be presumed, when computing the conditional release, that 100% of the available good time credit is earned and the good time credit shall be applied on a projected basis."

K.A.R. 44-6-120 (1989) included the following provision:

"(c) Application only to minimum until parole eligibility. All good time credit awards

> and forfeitures shall be applied only to the minimum sentence until the parole eligibility has been reached. However, meritorious good time shall be applied simultaneously to both the minimum and maximum sentence. After parole eligibility has been reached, no further good time credit of any kind shall be awarded on the minimum. After parole eligibility, all forfeitures of statutory good time credits or legislative good time credits, and all awards or forfeitures of 'meritorious' good time credits, shall be applied to the maximum term of the sentence to form the conditional release date. The inmate shall be considered as proceeding toward the conditional release date following parole eligibility or hearing."

Meritorious good time credits were awarded under special circumstances for heroic actions or for outstanding services and were in addition to the " 'statutory authorized' good time credits." K.A.R. 44-6-126 (1989); see K.S.A. 1996 Supp. 22-3717(s).

K.A.R. 44-6-124(a) (1989) set forth standards for awarding good time "[f]or parole eligibility" but mentioned no standards to be applied in awarding good time for conditional release. K.A.R. 44-6-124(a) (1989) further provided that an inmate was presumed to have earned good time credits for the time served in jail between his or her official "sentence begins date" and the date of admission to the prison facility. See K.S.A. 21-4614.

K.A.R. 44-6-125 (1989) described the good time credits applicable to parole eligibility in terms of being "earned" but described the good time credits applicable to conditional release as simply those credits "used to

create the conditional release date." The relevant subsection stated:

> "(b) Forfeit only on minimum until parole eligibility. Prior to parole eligibility, forfeited good time credits shall be subtracted from the amount of good time credits earned toward the parole eligibility only, and not from those credits used to create the conditional release date. After parole eligibility is established, forfeited credits shall be subtracted from the credits used to form the conditional release date."

When all of the above regulations are read together, it becomes clear that credits for *parole eligibility* had to be *actually* earned. The only good time credits an inmate was *presumed* to have earned for his or her parole eligibility date were for the period between the sentence begins date and the date of admission to the prison facility. These were automatically awarded and subtracted from the minimum sentence to make up the first tentative parole eligibility date. Thereafter, good time credits were awarded by the unit team after each review period only to the extent deemed earned and were applied to the inmate's minimum sentence to establish a progressively nearer parole eligibility date. K.A.R. 44-6-108(b) (1989); K.A.R. 44-6-113 (1989).

In contrast, an inmate's *conditional release date* was initially set based on a *presumption* that all credits authorized by the legislature *had been earned*. Standards for awarding good time to conditional release were not supplied because they were not needed – all available good time credits were awarded at the outset for purposes of

conditional release and could only be lost if forfeited. Awards and forfeitures were to affect the parole eligibility date only before reaching that date, and only forfeitures were to affect the conditional release after the parole eligibility date had been reached.

Amended Regulations

On January 3, 1995, DOC significantly changed the language of K.A.R. 44-6-142 applicable to setting conditional release dates. Instead of providing that 100 percent of the available good time credits applicable to the conditional release date should be presumed earned and applied on a projected basis, the regulation read in pertinent part:

> "When computing the conditional release date, it shall be presumed that prior to March 1, 1995, 100% of the available good time credits were earned. On and after March 1, 1995, good time credits shall be awarded on an earned basis pursuant to K.A.R. 44-6-124 for the purpose of determining the conditional release date." K.A.R. 44-6-142 (1996 Supp.).

In accord with this newly amended version of K.A.R. 44-6-142, Steltzlen's tentative conditional release date was changed, as was the method of awarding him good time credits toward his conditional release date. Instead of having the benefit of having already "earned" all of his conditional release good time credits, Steltzlen now had to *actually* earn them, except for those available for all the review periods preceding March 1, 1995.

While DOC hints in its brief that there is no evidence in the record of how DOC formerly interpreted its regulations, the former interpretation and the change in method brought on by K.A.R. 44-6-142 (1996 Supp.) are illustrated by the paperwork documenting Steltzlen's good time awards record. Before March 1, 1995, the unit team worksheets clearly show that Steltzlen's conditional release date remained constant at May 17, 2000, while on the same paperwork, awards and forfeitures of good time were used to adjust his parole eligibility date from a starting point of May 17, 2005 (the latest date possible for Steltzlen's parole eligibility). The worksheets on which these good time awards and forfeitures were recorded specifically direct the unit team not to use awards and forfeitures to adjust the conditional release date before the first hearing for parole consideration.

As of March 1, 1995, Steltzlen's sentence was converted over to the new system of applying credits to conditional release. This conversion is documented on a paper entitled "DEPARTMENT OF CORRECTIONS CONDITIONAL RELEASE GOOD TIME AWARDS AND FORFEITURES CONVERSION LOG." In this conversion, Steltzlen was credited with all the credits that could have been earned between his sentence begins date (May 17, 1990) and the effective date of the changes (March 1, 1995) without regard for his disciplinary record: 4 years, 9 months, and 14 days. Thus, for every day Steltzlen had already served, he was considered as having earned a good time credit toward his conditional release date. These credits were then applied to Steltzlen's maximum sentence "expiration date" (*i.e.*, the date he would be released if no good time credits were applied). When the

conversion was completed, Steltzlen's tentative conditional release date was August 3, 2005, instead of May 17, 2000. At later review periods, using forms that had been newly revised by DOC to accommodate the change in calculations, Steltzlen's conditional release date was adjusted downward with each new award of earned credits.

Before his disciplinary convictions, Steltzlen's conditional release date had reached December 17, 2004. When the 90 days of credits were forfeited and the 60 days of credits were withheld, Steltzlen's conditional release date was changed to January 17, 2005. When the warden ordered the forfeitures replaced, the forfeitures were voided from Steltzlen's log, and the conditional release date was changed to October 17, 2004.

Conflict in Regulations

Steltzlen argues that K.A.R. 44-6-108 (1994) and K.A.R. 44-6-120(d)(1) (1994), which are currently in effect, prohibit the action purportedly authorized by K.A.R. 44-6-142 (1996 Supp.), that is, the adjustment of an inmate's conditional release date before the inmate reaches parole eligibility and the withholding of good time credits from conditional release under any circumstances. Although the above regulations are slightly different from those quoted earlier, their substance remains the same. K.A.R. 44-6-108 (1994) reads in pertinent part:

> "(b) In cases where the time required to be served is amenable to reduction by good time credits, good time credits shall be awarded as earned to reduce the minimum term of those

sentences, as described in these regulations and applicable law.

"(c) To establish the conditional release date, good time credits shall be presumed earned and shall be applied to the maximum sentence term first computed."

The relevant portion of K.A.R. 44-6-120 (1994) reads:

"(d) Application only to minimum until parole eligibility.

(1) Good time credit awards and forfeitures shall be applied only to the minimum sentence until the parole eligibility has been reached.

(2) However, meritorious good time shall be applied simultaneously to both the minimum and maximum sentence.

(3) After parole eligibility has been reached, no further good time credit of any kind shall be awarded on the minimum.

(4) After parole eligibility, all subsequent forfeitures of good time credits shall be utilized to adjust the conditional release date."

K.A.R. 44-6-108 (1994) provides for the earning of good time credits for parole eligibility and for the presumption of credits being earned for conditional release. K.A.R. 44-6-120 (1994) also provides that awards and forfeitures are only to be applied to the parole eligibility date prior to reaching that date, and that forfeitures shall be applied to the conditional release date after passing parole eligibility. These regulations, in particular K.A.R. 44-6-120 (1994) with its express prohibition against

adjustment of the conditional release date prior to reaching parole eligibility, directly conflict with K.A.R. 44-6-124 (1996 Supp.) and K.A.R. 44-6-142 (1996 Supp.) as applied by DOC.

In attacking Steltzlen's arguments, DOC contends that Steltzlen has raised on appeal, for the first time, the issue of the regulations being in conflict and that this court may not, therefore, consider this issue. We disagree. Steltzlen has asserted from the very beginning that the actions DOC attempted to take under K.A.R. 44-6142 (1996 Supp.) are prohibited by the terms of K.A.R. 44-6-120 (1994) and other regulations. Therefore, the issue has been properly raised by Steltzlen.

Second, DOC argues that the regulations should be interpreted in light of the overall statutory and regulatory scheme. DOC notes that the definitions section of the applicable regulations, K.A.R. 44-6-101(m) (1994), defines conditional release date as "the maximum sentence ending date minus total authorized good time credits not forfeited." DOC argues that "authorized" simply refers to the credits earned. However, in light of the background and language of the current regulations, the word "authorized" refers to the total amount of good time credits authorized by the legislature. See K.A.R. 44-6-101 (1989) (describing good time credits as being prescribed and established by the Kansas Adult Authority as "authorized by K.S.A. 22-3717") and K.A.R. 44-6-113 (1989) (differentiating between earned good time credits and the "maximum total authorized credits that an inmate may earn"). In Steltzlen's case, the total authorized credits would be credits in the amount of half his sentence.

DOC notes the definition of conditional release in K.S.A. 22-3718 as being "the inmate's maximum term or terms, less such work and good behavior credits as have been earned" and the description in K.A.R. 44-6-124 (1996 Supp.) of credits being "earned" to adjust the conditional release date. DOC argues that it is clear that the overall statutory and regulatory scheme contemplates that inmates be given the opportunity to actually earn good time credits which will be applied to the conditional release date in an ongoing process starting from the date the inmate enters the custody of the Secretary. While this may be true of the applicable statutes and of the newly amended regulations, the fact remains that under the old system, DOC chose to interpret its statutory directive by presuming the earning of good time credits with regard to the conditional release date.

Because the regulations conflict, there is no way for DOC to abide by both sets of regulations. The rules of statutory construction are also generally applicable to the interpretation of regulations. See 2 Am. Jur. 2d, Administrative Law § 239, p. 258. The general rule is that the several provisions of an act (or, in this case, a set of regulations) should be read together and construed with the aim of bringing them into harmony and giving full effect to every provision if reasonably possible to do so. *Easom v. Farmers Insurance Co.*, 221 Kan. 415, Syl. ¶ 3, 560 P.2d 117 (1977). However, when this is not possible and related statutes conflict, it is often said that the most recent enactment prevails as being the latest expression of the legislative intent. 73 Am. Jur. 2d, Statutes § 255, p. 426. This general rule has been noted in several Kansas cases. See, *e.g.*, *Jones v. Continental Can Co.*, 260 Kan. 547,

556, 920 P.2d 939 (1996); *State v. Sodders*, 255 Kan. 79, Syl. ¶ 2, 872 P.2d 736 (1994); *State v. Keeley*, 236 Kan. 555, 560, 694 P.2d 422 (1985).

In light of the above rule and DOC's clear intent to use the amended regulations to create a system where good time credits will be actually earned for both the parole eligibility date and the conditional release date, the implications and directives of K.A.R. 44-6-108(c) (1994) and 44-6-120(d) (1994) must give way to the framework established in the amended versions of K.A.R. 44-6-124 and 44-6-142. DOC's interpretation of its regulations should therefore stand as applied to those who committed their crimes on or after March 1, 1995.

The next issue is whether the application of the new regulatory scheme for awarding good time credits and setting conditional release dates violates the prohibition against ex post facto laws when applied to Steltzlen. United States Const. article I § 9, cl. 3 and § 10, cl. 1 provide that no state shall pass any ex post facto law. These clauses prohibit the enactment of any law " 'which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed.' [Citations omitted.]" *Weaver v. Graham*, 450 U.S. 24, 28, 67 L. Ed. 2d 17, 101 S. Ct. 960 (1981). "[T]wo critical elements must be present for a criminal or penal law to be *ex post facto:* it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it. [Citations omitted.]" *Weaver*, 450 U.S. at 29.

The first question is whether the ex post facto prohibition applies to regulations. Although unable to find any Kansas case explicitly ruling on this issue, "[p]olitical subdivisions of a state, or quasi-legislative instrumentalities, exercising delegated legislative power are within the ambit of the ex post facto clause." 16A C.J.S., Constitutional Law § 409, p. 355. This view that the ex post facto clause applies to regulations would seem to be an appropriate approach in Kansas, where it is well recognized that "[t]he Kansas Administrative Regulations when adopted have the force and effect of a statute (K.S.A. 77-425) and as in the case of statutes will be construed to operate prospectively unless a contrary intent is clearly indicated." *Harder v. Kansas Comm'n on Civil Rights,* 225 Kan. 556, 559, 592 P.2d 456 (1979); see *Jones v. The Grain Club,* 227 Kan. 148, Syl. ¶ 1, 605 P.2d 142 (1980).

DOC argues that the new regulations are not retrospective because they presume that all good time credits available prior to March 1, 1995, were earned, and that it is only after March 1, 1995, that new credits must actually be earned. Therefore, under DOC's view, any withholdings would occur as a result of future conduct. DOC also argues that the change does not impose additional punishment to that prescribed because Steltzlen still has the opportunity to earn the same number of good time credits as before.

It is the effect of the law that determines whether it is ex post facto. *Weaver,* 450 U.S. at 31. In rendering its decision on the ex post facto issue, the district court relied greatly on *Weaver.* In *Weaver,* the Court addressed the question of whether a change in Florida's provisions

for prison gain time credits was an ex post facto law. Under Florida law, a certain number of gain time credits were awarded to inmates automatically on a monthly basis simply for avoiding disciplinary infractions and for performing assigned tasks. In 1978, Florida law lessened the number of gain time credits available. At the same time, however, the law was also changed to increase the number of "special gain-time" credits which could be earned for performing conscientious or outstanding work in a variety of ways. *Weaver,* 450 U.S. at 34-35, n.18. Weaver argued that the new law was an ex post facto law when applied to him.

The Court in *Weaver* made it clear that an ex post facto law does not depend on whether the right interfered with is a vested right. *Weaver,* 450 U.S. at 29. Such an analysis is relevant under due process considerations but not under the ex post facto clause. The Court further noted that a statute may be retrospective even if it alters conditions outside the sentence. 450 U.S. at 32.

Addressing the retrospectivity requirement, the Court stated:

> "The critical question is whether the law changes the legal consequences of acts completed before its effective date. In the context of this case, this question can be recast as asking whether [the Florida statute in question] applies to prisoners convicted for acts committed before the provision's effective date. Clearly, the answer is in the affirmative." *Weaver,* 450 U.S. at 31.

The Court went on to address the question of whether the law disadvantaged Weaver. Florida argued

that because of the added opportunities for special gain time credits, the net effect of the changed law was an increased availability of gain time deductions and that the change, therefore, did not disadvantage those like Weaver who committed their crimes prior to the effective date of the change. The Court acknowledged the expanded opportunities for special gain time deductions, as well as the legislative intent under the changes to promote rehabilitation and to increase incentives for productive conduct. *Weaver,* 450 U.S. at 34-35. However, the Court went on to say:

> "But none of these provisions for extra gain time compensates for the reduction of gain time available solely for good conduct. The fact remains that an inmate who performs satisfactory work and avoids disciplinary violations could obtain more gain time per month under the repealed provision . . . *than he could for the same conduct under the new provision.* . . . To make up the difference, the inmate has to satisfy the extra conditions specified by the discretionary gain-time provisions." (Emphasis added.) 450 U.S. at 35.
>
> "Thus, the new provision constricts the inmate's opportunity to earn early release, and thereby makes more onerous the punishment for crimes committed before its enactment. This result runs afoul of the prohibition against *ex post facto* laws." *Weaver,* 450 U.S. at 35-36.

At the time Steltzlen committed his crime, the regulations in effect granted Steltzlen an automatic award of all statutorily available good time available for his conditional release date and set his conditional release date on that basis. All Steltzlen had to do under those regulations

was keep from forfeiting the good time he was presumed to have earned. When the new regulations were applied to Steltzlen, the conditional release good time credits that had been presumptively awarded to Steltzlen were taken away and only a portion were restored. In order to regain the rest, Steltzlen is required to meet extra conditions not required under the old regulations. The new regulations adversely change the legal consequences of Steltzlen's crime by creating a situation where Steltzlen must now earn good time credits that he was considered to have already earned under the old regulations. This is similar to the situation in *Weaver* where the statutory changes enacted there required the inmates to do something extra and to subject themselves to the discretion of the prison in order to gain the same level of early release advantage accorded under the old statute.

The regulations do more than affect the consequences of Steltzlen's future conduct. The regulations reach back and take away what was already given to Steltzlen under the old regulations in effect at the time of his crime and, accordingly, have a disadvantageous retrospective effect on him. Cf. *Lynce v. Mathis*, 519 U.S. ___, 137 L. Ed. 2d, 63, 75, 117 S. Ct. 891 (1997) (holding that a new statute interpreted as calling for the retroactive cancellation of formally awarded provisional credits to certain classes of inmates was an ex post facto law).

A similar situation was also encountered in *Spradling v. Maynard*, 527 F. Supp. 398 (W.D. Okla. 1981). In *Spradling*, the Oklahoma statutes in effect prior to September 8, 1976, provided a system where work and good time credits were automatically applied to an inmate's sentence and were mandatory, subject only to being forfeited

at a later date for disciplinary reasons. The statutes were then amended to require the inmate to earn the credits by satisfying certain conditions. The court in *Spradling* determined that the new law made more onerous the punishment for crimes committed before its enactment and violated the ex post facto prohibition when applied to inmates who committed their crimes prior to the effective date of the act. 527 F. Supp. at 404. Applying the approach of *Spradling*, the current regulations would be an ex post facto law as applied to Steltzlen.

DOC also argues that the regulations in question merely effectuate the enabling statute's directive that good time credits shall be awarded on an earned basis. See K.S.A. 1996 Supp. 22-3725(d). However, in the recent case of *Lynce*, 137 L. Ed. 2d 63, the Supreme Court chastised the parties for placing undue emphasis on the lawmakers' subjective *intent* and focused on the importance of the *effect* brought by the disputed changes. While the current regulations arguably do a better job of fulfilling the legislative intent, this does not change the fact that DOC's chosen method of complying with the legislative directive was different in 1990 than it is now, and that difference will put inmates like Steltzlen at a disadvantage if they are subject to the recent regulatory changes. Nor does it matter that the legislative proviso for good time credits, and the admittedly generous terms of the 1990 regulations regarding conditional release, were established as a matter of grace. An ex post facto violation can arise even from a change to penal provisions accorded as a matter of grace. *Weaver*, 450 U.S. at 30-31.

Affirmed.

APPENDIX B

SUPREME COURT ORDER
DISTRICT CASE NO. 9607HC74

IN THE SUPREME COURT
OF THE STATE OF KANSAS

MARK L. STELTZLEN, APPELLANT, CROSS-APPELLEE,
V NO. 96-77897-AS
DAVID R. MCKUNE, APPELLEES,
ET AL., CROSS-APPELLANTS.

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

PETITION FOR REVIEW BY DAVID R. MCKUNE, ET AL.

CONSIDERED BY THE COURT AND DENIED.

DATE: 07/09/98.

CAROL G. GREEN
CLERK

APPENDIX C

COURT OF APPEALS ORDER
DISTRICT CASE NO. 9607HC74

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

MARK L. STELTZLEN, APPELLANT, CROSS-APPELLEE,
V NO. 96-77897-A
DAVID R. MCKUNE, APPELLEES,
ET AL., CROSS-APPELLANTS.

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

MOTION FOR STAY PENDING CERTIORARI TH [sic] THE UNITED STATES SUPREME COURT BY APPELLEE, DAVID MCKUNE, ET AL.

DENIED.

RESPONSE NOTED.

DATE: 08/05/98.

CAROL G. GREEN
CLERK